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The State of South Carolina

7-10-85  
L. L. L.



Office of the Attorney General

T. TRAVIS MEDLOCK  
ATTORNEY GENERAL

REMBERT C. DENNIS BUILDING  
POST OFFICE BOX 11549  
COLUMBIA, S.C. 29211  
TELEPHONE 803-758-3970

October 9, 1985

The Honorable Eugene C. Stoddard  
Member, House of Representatives  
Route 3  
Gray Court, South Carolina 29645

Dear Representative Stoddard:

You have requested advice as to the validity of a provision of the Education Improvement Act (EIA). The provision in question states that beginning July 1, 1986 "...employment may be provided only to teachers who demonstrate minimum knowledge proficiency by meeting..." one of four (4) criteria set forth in the Act. Act No. 512, Part II, § 9, 1984 Acts and Joint Resolutions of South Carolina, as codified in Section 59-20-55 of the Code of Laws of South Carolina, as amended. These criteria include holding a valid professional certificate; having a score of 425 or greater on The Common Examination of the National Teachers Examination (NTE); meeting the minimum qualifying score on the appropriate area teaching examination; or meeting the minimum standards on the basic skills examinations, as prescribed by the State Board of Education in Section 2 of Act No. 187 of 1979 (Section 59-26-10 of the Code). Because some teachers hold certificates which do not constitute "professional certificates", you have questioned whether the EIA would validly prohibit the employment of those teachers if they do not meet one of the other EIA criteria for employment listed above.

It is evident that your inquiry at least in part questions the constitutionality of applying the foregoing provisions of the EIA to the referenced situation. After researching these issues, it is apparent that any final resolution thereof would likely require an extensive review and adjudication of important factual issues.

To paraphrase our Supreme Court, when reviewing the constitutionality of an act of the General Assembly, a factual

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record is often necessary "before any reasonable analysis of the issues involved can be attempted..." Ex Parte Self, et al. v. Williams, et al., (South Carolina Supreme Court September 25, 1985). More particularly, the United States Supreme Court has recently emphasized the need for a complete factual record when reviewing the validity of employment examinations. Washington v. Davis, 426 U.S. 229, 252, 48 L.Ed.2d 597, 96 S.Ct. 2040 (1976). See also, Village of Arlington Heights v. Metropolitan Housing Devel. Corp., 426 U.S. 229, 266, 50 L.Ed.2d 450 (1977). At the very least, a complex statistical analysis would be necessary to judge the validity of the tests concerned.

Moreover, courts have indicated that when test scores are to be used as a basis for discharging teachers who are already employed, the scores and examinations must be factually justified as valid and reliable bases for these employment decisions. Baker v. The Columbus Municipal Separate School Dist., 462 F.2d 112 (5th Cir. 1972).<sup>1/</sup> As the Fourth Circuit Court of Appeals has stated, there must be "clear evidence" as to the validity of tests "used in the teacher evaluation and selection process." Walston v. Co. School Bd. of Nansamond, 492 F.2d 919, 924 (4th Cir. 1974). Therefore, any such evaluation of the EIA examination and scoring criteria would, of necessity, involve factual investigations. As previous opinions of this Office and other Attorneys General conclude, the scope of an Attorney General's opinion is to address questions of law rather than the investigation of facts. Ops. Attv. Gen. (South Carolina, April 5, 1984, and December 12, 1983; California, August 24, 1978; Iowa, July 16, 1981, August 14, 1981 and June 29, 1984; Minnesota, April 25, 1985; Nevada, November 19, 1981; Oklahoma, June 6, 1982; Tennessee, March 16, 1982; Texas, July 25, 1983; West Virginia, August 7, 1979; Wisconsin, June 1, 1978).

Because this Office does not have the authority of a court or other fact-finding body, we are not able, in a legal opinion, to adjudicate or investigate factual questions. Unlike a fact-finding body such as a legislative committee, an administrative agency or a court, we do not possess the necessary fact-finding authority and resources required to adequately determine the difficult factual questions present here.

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<sup>1/</sup> U.S. v. State of South Carolina, 445 F.Supp. 1094 (D.C.S.C. 1977), aff'd., 434 U.S. 1026 (1978) upheld the validity of the use of the NTE regarding the certification of teachers and sustained differentials in pay scales based upon NTE scores.

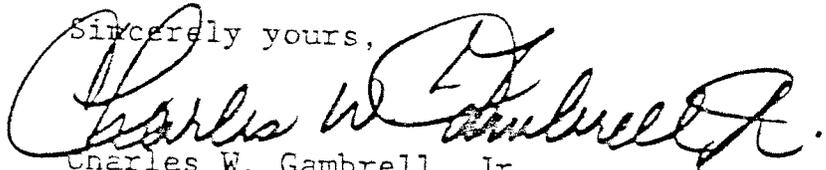
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A fact-finding body normally possesses the authority to call witnesses, swear them under oath and compel them to testify in a public proceeding. Witnesses are usually subject to cross-examination, to bring out all the relevant facts. A formal record of the proceedings is maintained and numerous documents are normally admitted into evidence. In a court or administrative proceeding extensive discovery of facts is usually undertaken by the parties, as was the case when the validity of the NTE examination was questioned in the 1970's. The credibility of witnesses, especially the several experts who would undoubtedly testify, must be determined by the fact finder. Of course, none of these important mechanisms for bringing out all the relevant facts is available in a legal opinion of this Office.

In short, a legal opinion of this Office would be inadequate to properly answer the question of the validity of the criteria established by the EIA. Because such validity is so intertwined with and dependent upon the facts involved, only a fact-finding body could make that determination.

If we can be of further assistance, please let us know.  
With kindest regards, I remain

Sincerely yours,



Charles W. Gambrell, Jr.  
Assistant Attorney General

CWGjr:djg